No. 14,553

United States Court of Appeals

For the Ninth Circuit

NEVADA-PACIFIC DEVELOPMENT CORPORATION, V. E. WILLEY, G. F. STURDEVANT, C. FITCH, L. A. PRISK, BILL GREGORY, D. HULBERT and GEORGE N. TAUSAN,

Appellants,

vs.

HARLEY W. GUSTIN,

Appellee.

Upon Appeal from the District Court of the United States for the District of Nevada.

OPENING BRIEF FOR APPELLANTS.

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STATEMENT OF PLEADINGS.

This suit was brought by plaintiff Harley W. Gustin (appellee) against defendants, Nevada-Pacific Development Corporation et al. (appellants) for the purpose of quieting title to a number of lode mining locations embraced in what is commonly known as the Kay Cooper group, allegedly located on unappropriated public domain and in full compliance with the laws of the United States and of the State of Nevada, by Carl Harry Cooper and R. C. Peterson between

September 16, 1949 and October 14, 1949 (plaintiff's complaint, Tr. 4-9). As originally constituted the Kay Cooper group comprised eleven claims, numbered consecutively from 1 to 11 inclusive, but as will later appear in the statement of the case, Kay Cooper locations Nos. 1, 2, 3, 4, 5, 7 and 11 are no longer in issue (Tr. 41).

Plaintiff also alleges that each of the Kay Cooper locations has been maintained in full compliance with the laws of the United States and of the State of Nevada as a valid and subsisting mining claim; that plaintiff acquired by conveyance all of said locators' right, title and interest therein and is now the owner and entitled to the sole and exclusive possession thereof, "in accordance with the laws of the United States and of the State of Nevada relating to the location and maintenance of mining claims" (Tr. 9-10); and that plaintiff has expended (on the entire group of eleven locations as originally constituted) more than $10,000.00 in exploratory and development work (Tr. 9-10).

Plaintiff then alleges that on or about March 14, 1951 while he was in peaceable possession of the entire Kay Cooper group, defendants wrongfully and in trespass entered thereon and ousted plaintiff from possession, and that defendants have ever since wrongfully so continued in trespass upon and to withhold possession of the property, claiming and asserting some right, title or interest therein, which claims and assertions are wholly wrongful and without right or legal foundation (Tr. 10).

Answer and cross-complaint was filed by defendants Nevada-Pacific Development Corporation, Bill Gregory, L. A. Prisk and D. Hulbert (Tr. 15-24). Other nominal parties defendant named in the complaint failed to appear or answer and their default was entered by the Court below on pre-trial conference, at which defendant Bill Gregory was also eliminated (Tr. 30-34).

In substance, answering defendants deny all of the material allegations of the complaint as to the location, validity and maintenance as subsisting mining claims of most of the locations comprised in plaintiff's Kay Cooper group (Tr. 16).

By way of cross-complaint answering defendants allege the relocation on February 8, 1951 by L. A. Prisk and D. Hulbert, in full compliance with Federal and State laws of the several lode mining claims embraced in defendants' Ray Ricketts group, and that said claims were thereafter maintained in full compliance with said laws (Tr. 20-21); that on February 15, 1951 defendant Nevada-Pacific Development Corporation acquired peaceable possession of said Ray Ricketts group from defendants Prisk and Hulbert, and continuously thereafter have remained in actual possession and engaged in the mining and development thereof; and that the adverse claims of plaintiff are without right or legal foundation (Tr. 21-22).

Plaintiff's answer to defendants' cross-complaint alleges as a first defense, failure to state a claim upon which relief can be granted (Tr. 24), and as a second

defense denies all of the material allegations of said cross-complaint (Tr. 25-26).

Jurisdiction was conferred upon the District Court of the United States for the District of Nevada as set forth in the pleadings (Tr. 3-4; 15-16). The Court below having rendered final judgment herein, jurisdiction to review said judgment on appeal to this Court is conferred by Sec. 225 (a) (d) 28 U.S.C., Judicial Code, sec. 128 amended, and 30 *U.S.C.*, sec. 23 (R.S. 2320).

STATEMENT OF THE CASE.

In the prosecution of this appeal we are not concerned with those portions of the Record relating to:

(a) The original locations designated as Ray Ricketts Nos. 1 to 4 inclusive, made by defendants' predecessor Bill Gregory on July 1, 1947 (Tr. 49-50, par. 12). Those attempted locations were properly found to be void by the Court below, for failure to record Certificates of Location, as required by 1941 Stat. Nev., pp. 93-4; N.C.L. 1941 Supp., sec. 4122 (Tr. 39, 45);

(b) With the subsequent relocation of the Ray Ricketts No. 3 claim, attempted to be made in 1951 by defendants' grantors, L. A. Prisk and D. Hulbert (Tr. 51, par. 17). It was admitted by defendants, and the Court below so held, that there was no evidence of a discovery of mineral bearing vein or lode on the Ray Ricketts No. 3 (Tr. 44);

(c) With plaintiff's Kay Cooper Nos. 1, 2, 3, 4, and 5 attempted locations, which the Court below also held to be invalid for failure to record Certificates of Location as required by the Nevade statute, and from which determination plaintiff has taken no cross appeal (Tr. 41, 45); or

(d) With plaintiff's Kay Cooper Nos. 7 and 11 locations, as to which there is no conflict with defendants' Ray Ricketts Nos. 1, 2 and 4 claims (Tr. 38).

The issues are confined to two fundamental questions:

(1) Whether plaintiff's mining locations known as Kay Cooper No. 6, Kay Cooper No. 8, Kay Cooper No. 9 and Kay Cooper No. 10 initiated by plaintiff's grantors, Carl Harry Cooper and R. C. Peterson between July 31, 1949 and September 30, 1949 had been completed in full compliance with legal requirements, Federal and State, particularly in relation to actual discovery of mineral-bearing rock in place on each of said locations so as to warrant their recognition as valid and subsisting mining locations, at the time defendants Hulbert and Prisk made their re-locations of Ray Ricketts No. 1, Ray Ricketts No. 2 and Ray Ricketts No. 4 on February 8, 1951.

(2) Whether a discovery of mineral-bearing rock in place was made upon the lands embraced in defendants' 1951 relocation of the Ray Ricketts No. 2 claim in the manner and within the time prescribed by law.

The chronological history of the mining lands embraced in the conflicting locations of plaintiff and defendants, as disclosed by the record, shows that the mining lands as covered by the 1951 relocations of Ray Ricketts Nos. 1, 2 and 4 of Nevada-Pacific Development Corporation's grantors were originally located by the predecessors in interest of said grantors some twenty years prior to plaintiff's entry on the ground (Tr. 276-280).

It also appears from the record that the original 1947 attempted locations of the Ray Ricketts group by defendant Gregory preceded plaintiff's purported locations of Kay Cooper Nos. 6, 8, 9 and 10 in 1949 (Plaintiff's Ex. 2, Tr. 72), but were properly held invalid by the Court below for failure to file Certificates of Location within the 90-day period prescribed by Nevada law (Tr. 39), that those void locations were followed by the 1951 relocations of Ray Ricketts Nos. 1, 2 and 4 lode mining claims made by Hulbert and Prisk on February 8th of that year (Defendants' Ex. G, Tr. 273-4, 216, 316-21), and that Certifiates of Location therefor were duly recorded within said 90-day period (Defendants' Ex. G, Tr. 270-4).

The Certificates of Location for plaintiff's Kay Cooper Nos. 6, 8, 9 and 10 (Plaintiff's Ex. No. 1, Tr. 70-1) recite that Location Notices were posted on the ground on July 31, 1949 and September 30, 1949. All of those Certificates were recorded within the 90-day period prescribed by Nevada law, and those formal acts of location ante-dated the relocations on Febru-

ary 8, 1951 of defendants' Ray Ricketts Nos. 1, 2 and 4 claims.

These factual conditions have resulted in conflict areas as between

(a) Plaintiff's Kay Cooper No. 6 location, which is overlapped by defendants' Ray Ricketts No. 4 claim;

(b) Plaintiff's Kay Cooper No. 8 location, which is overlapped by defendants' Ray Ricketts Nos. 1 and 2 claims;

(c) Plaintiff's Kay Cooper No. 9 location, which is overlapped by defendants' Ray Ricketts Nos. 1, 2 and 4 claims; and

(d) Plaintiff's Kay Cooper No. 10 location, which is overlapped by defendants' Ray Ricketts No. 2 claim (Plaintiff's Ex. 11, Tr. 75; Plaintiff's Ex. 17, Tr. 177; Defendants' Ex. A & B, Tr. 75-6).

Defendants contend that excepting only for the self serving declarations of discovery recited in plaintiff's Certificates of Location, plaintiff has presented no satisfactory evidence of the actual discovery of a vein or lode of mineral-bearing rock in place on any of the purported Kay Cooper locations Nos. 6, 8, 9 and 10 anterior to the relocation of defendants' Ray Ricketts Nos. 1, 2 and 4 claims on February 8, 1951; that lacking such precedent discovery the attempted locations of Kay Cooper Nos. 6, 8, 9 and 10 were and are invalid, and that the lands purportedly embraced therein

were then open to relocation by defendant Nevada-Pacific Development Corporation's grantors.

SPECIFICATION OF ERRORS.

1—The Findings, Conclusions and Decision of the Court below, in the particulars hereinafter mentioned, are not supported by the evidence, are contrary to the evidence, and are against law.

2—The Court below erred in finding and deciding that the Kay Cooper Nos. 6, 8, 9 and 10 lode mining claims were located prior to October 15, 1949 in full compliance with the laws of the United States and of the State of Nevada (Finding No. 5, Tr. 47).

There is no factual evidence in the record that a vein or lode of mineral-bearing rock in place was discovered upon each of said mining locations prior to the location of defendants' Ray Ricketts Nos. 1, 2 and 4 on February 8, 1951, as required by R.S. 2320 (30 USCA, sec. 23), and sec. 4121 Nevada Compiled Laws 1929.

3—The Court below erred in finding and deciding that said Kay Cooper Nos. 6, 8, 9 and 10 have each been maintained in full compliance with the laws of the United States and of the State of Nevada, and at all times since their location have been and are valid and subsisting mining claims (Finding No. 8, Tr. 49).

Valid discovery, as mentioned in par. 2 supra, is an essential prerequisite to the maintenance of a valid and subsisting lode mining claim.

4—The Court below erred in finding and deciding that plaintiff is the owner of, and entitled to the sole and exclusive possession of the Kay Cooper Nos. 6, 8, 9 and 10 claims in accordance with the laws of the United States and of the State of Nevada relating to the location and maintenance of lode mining claims (Finding No. 9, Tr. 48-9).

In the absence of discovery, an inchoate or attempted location confers no exclusive right of possession on the purported locator as against a subsequent locator who makes peaceable entry on the ground and effectuates a valid location by prior discovery.

5—The Court below erred in finding and deciding that at all times mentioned in the Complaint plaintiff was in the quiet and peaceful possession, and entitled thereto, of Kay Cooper Nos. 6, 8, 9 and 10 lode mining claims and that while plaintiff was in such lawful possession, defendants attempted to locate Ray Ricketts Nos. 1, 2 and 4 lode mining claims covering and embracing portions of said Kay Cooper Nos. 6, 8, 9 and 10 claims (Finding No. 10, Tr. 49).

As mentioned in par. 4 supra, in the absence of a discovery on each potential claim plaintiff was not entitled to such sole and exclusive possession as would bar a subsequent locator from peaceable entry thereon for the purpose of making a location validated by actual discovery.

6—The Court below erred in finding and deciding that defendants' claims of title to the premises covered by Kay Cooper Nos. 6, 8, 9 and 10, or portions thereof embraced in the Ray Ricketts Nos. 1, 2 and 4 locations, are wrongful and without right (Finding No. 11, Tr. 49).

For the reasons stated in pars. 2 and 4 supra, defendants' peaceable entry on February 8, 1951 for the purpose of locating and validating by actual discovery the Ray Ricketts Nos. 1, 2 and 4 mining claims was rightful and legally permissible.

7—The Court below erred in finding and deciding that no mineral-bearing vein or ledge (lode) of rock in place was discovered on the 1951 location of defendants' Ray Ricketts No. 2 lode mining claim, except upon that portion of said claim "which conflicts with, overlaps and embraces ground within the confines of the valid and prior existing lode location, Kay Cooper lode mining claim No. 8." (Finding No. 16, Tr. 51).

For the reasons stated supra in pars. 2, 3, 4 and 6, the lands embraced in the 1951 location of defendants' Ray Ricketts No. 2 lode mining claim, allegedly conflicting with and overlapping plaintiff's Kay Cooper No. 8 location, were at the time of the location of said Ray Ricketts No. 2 claim on February 8, 1951, part of the open and unappropriated public domain, because of the failure of either plaintiff or his grantors to make a valid discovery on the lands sought to be embraced in said Kay Cooper No. 8 location prior to the validation of said Ray Ricketts No. 2 claim by

actual discovery thereon of a vein or lode of mineral-bearing rock in place in the manner and within the time prescribed by law.

8—The Court below erred in finding and deciding that plaintiff has valid title to those portions of the ground embraced in defendants' Ray Ricketts Nos. 1, 2 and 4 lode mining claims which conflict with or embrace any of the ground covered by plaintiff's Kay Cooper Nos. 6, 8, 9 and 10 lode mining claims (Finding No. 19, Tr. 52).

This finding is inconsistent with Finding No. 15 (Tr. 50) in which the Court below holds that Ray Ricketts Nos. 1 and 4 were located by defendants Prisk and Hulbert on February 8, 1951 "in full compliance with the laws of the United States and of the State of Nevada."

Time of location is not the sole controlling factor in determining the question of seniority as between conflicting mining claimants. The more important factor to be considered is priority of discovery, as mentioned supra in pars. 2, 3, 4, 6 and 7.

9—The Court below erred in finding and deciding that defendants' claims to Ray Ricketts Nos. 1 and 4 are limited to those portions not in conflict with or embracing any of the land included in Kay Cooper Nos. 6, 8, 9 and 10 (Finding No. 20, Tr. 52).

This Finding is also inconsistent with Finding No. 15, for the reasons mentioned supra in par. 8.

10—The Court below erred in failing to find, as a Conclusion of Law, that defendants' 1951 location of

the Ray Ricketts No. 2 lode mining claim was made upon the open and unappropriated public domain; that prior discovery of a mineral-bearing vein or lode was made thereon by defendants in the manner and within the time prescribed by law; and in failing and refusing to render judgment quieting title thereto in defendants (Tr. 53-4).

11—The Court below erred in failing to find, as a Conclusion of Law, that plaintiff's attempted locations of Kay Cooper Nos. 6, 8, 9 and 10 purported lode mining claims were and are invalid for failure on the part of either plaintiff or his grantors to make discovery thereon of a vein or lode of mineral-bearing rock in place as required by law; in failing to find that defendants made prior discovery on the Ray Ricketts Nos. 1, 2 and 4 lode mining claims, and upon each of said claims in the manner and within the time prescribed by law; and in failing and refusing to render judgment quieting title in defendants to all those parts and portions of the lands sought to be embraced in plaintiff's Kay Cooper Nos. 6, 8, 9 and 10 attempted locations which overlap and are in conflict with defendants' Ray Ricketts Nos. 1, 2 and 4 lode mining claims (Tr. 52-3).

SUMMARY OF ARGUMENT.

As indicated in the preceding Statement and Specification, it is defendants' purpose to establish, by a narrative analysis of all of the material evidence, that

the attempted locations of plaintiff's Kay Cooper Nos. 6, 8, 9 and 10 are invalid for failure to make mineral discovery on each of those claims as required by both Federal and State law.

Plaintiff presented no such evidence of discovery as is required by the mandatory provisions of the Federal statute and of the equally controlling Nevada statute (R.S. 2320, 30 U.S.C., sec. 23 and sec. 4121, Nevada Compiled Laws 1929).

The burden of proving prior discovery for the validation of those attempted locations is upon plaintiff, and has not been met. Nor did the Court below make any specific findings on the all important question of discovery, but limited its findings in that regard to a generalized statement to the effect that plaintiff's locations were made and maintained in full compliance with the laws of the United States and of the State of Nevada (Findings Nos. 5 and 8, Tr. 47-8).

In the absence of substantial evidence of prior discovery, as the essential element material to the issue of plaintiff's allegedly superior title to possessory mineral lands located on the public domain, the findings of the Court below are so clearly erroneous as to warrant reversal (FRCP 52a).

As opposed to the lack of positive evidence of discovery on plaintiff's Kay Cooper Nos. 6, 8, 9 and 10, defendants presented undisputed evidence that valid discovery of a vein or lode of mineral-bearing rock in place was made upon each of defendants' Ray Ricketts Nos. 1, 2 and 4 claims.

The Court below predicated its adverse findings as to certain portions of defendants' Ray Ricketts Nos. 1 and 4 claims solely upon priority of posting Location Notices and filing Certificates of Location for plaintiff's Kay Cooper Nos. 6, 8, 9 and 10 prescribed by Sec. 4121 N.C.L. 1929 and Sec. 4122 N.C.L. 1941 Supp., without reference to the fundamental need for actual discovery required by Federal and State laws. In finding defendants' Ray Ricketts No. 2 claim absolutely void the Court below held that the only discovery made on that claim is within the conflict area overlapping plaintiff's Kay Cooper No. 8 lode mining claim (Finding No. 16, Tr. 50-1; and Tr. 43-46).

ARGUMENT.

1. THERE WAS NO VALID DISCOVERY ON PLAINTIFF'S KAY COOPER NOS. 6, 8, 9 AND 10 ATTEMPTED LODE MINING LOCATIONS.

Throughout the mining history of the West actual discovery of a mineralized vein or lode of rock in place has been a mandatory requirement, recognized by miners' rules and regulations and later by Courts of last resort, as the genesis and fundamental essential to validation of a lode mining claim on the public domain.

A review of the evidence adduced by plaintiff in support of alleged discoveries on any of his conflicting Kay Cooper locations Nos. 6, 8, 9 and 10 conclusively demonstrates the absence of such a discovery as is required by mining law, Federal and State.

The Federal statute (R.S. 2320) prescribes:

"Length of claims on veins or lodes. Mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, located prior to May 10, 1872, shall be governed as to length along the vein or lode by the customs, regulations, and laws in force at the date of their location. A mining claim located after the 10th day of May, 1872, whether located by one or more persons may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the 10th day of May, 1872 render such limitation necessary. The end lines of each claim shall be parallel to each other."

(30 U.S.C., sec. 23, p. 47.)

Nevada law on the requirements for discovery is explicit:

"Location work.—Boundaries, how and when defined. Sec. 2. The locator of the lode mining claim must sink a discovery shaft upon the claim located four feet by six feet to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or deeper, if necessary to show by such work a lode deposit of mineral in place; a cut or crosscut or tunnel which cuts

> a lode at a depth of ten feet or an open cut along the said ledge or lode, equivalent in size to a shaft four feet by six feet by ten feet deep, is equivalent to a discovery shaft."
>
> (Nevada Compiled Laws 1929, sec. 4121)

Similar state statutes supplementing Federal law on the location of mining claims have been upheld as exercising a lawful delegation of Congressional legislative power (*Butte City Water Co. v. Baker,* 196 U.S. 119; 49 L.Ed. 409).

Plaintiff opened his case with documentary offers, which include Certificates of Location for Kay Coopers 6, 8, 9 and 10, and descriptions of the discovery work allegedly performed by the locators in compliance with Nevada law (Sec. 4121, supra).

Kay Cooper No. 6 was located on July 31, 1949 by Carl Harry Cooper and R. C. Peterson. The Certificate of Location describes the discovery work as:

> "The discovery work consists of an open cut located about 50 feet in a Southerly direction from the location monument, and its dimensions are 6 feet wide, 8 feet long and 5 feet deep, exposing ledge, lode or vein."

and as having been completed since July 31, 1949. The Certificate was recorded on September 12, 1949 (Plaintiff's Ex. 2, Tr. 72).

Kay Cooper No. 8 was located on August 1, 1949 by the same locators according to the Notice of Location (Plaintiff's Ex. 1, Tr. 71-2), but on September 15, 1949, as shown in the Certificate of Location

(Plaintiff's Ex. 2, Tr. 72). The Certificate of Location describes the discovery work as:

> "The discovery work consists of an Open Cut located about 25 feet in a westerly direction from the location monument, and its dimensions are 6 feet wide, 13 feet long and 3 feet 6 inches deep, exposing ledge, lode or vein in place"

and as having been completed since September 15, 1949. The Certificate was recorded on September 16, 1949.

Kay Cooper No. 9 was located on September 30, 1949 by the same locators. The Certificate of Location describes the discovery work as:

> "The discovery work consists of a pit situated about 25 feet in a Westerly direction from the location monument, and its dimensions are 6 feet wide, 14 feet long, 3.5 deep, ... feet wide, ... feet long and ..... feet deep, exposing a ledge, lode or vein in place."

and as having been completed between September 30, 1949 and October 7, 1949. The Certificate was recorded on October 14, 1949.

Kay Cooper No. 10 was located on September 30, 1949 by the same locators, according to the Certificate of Location (Plaintiff's Ex. 2, Tr. 72), there being no specific testimony on that point. The Certificate of Location describes the discovery work as:

> "The discovery work consists of a pit situated about 20 feet in a westerly direction from the location monument, and its dimensions are 5.5

> feet wide, 14 feet long and 3.25 feet deep, exposes a ledge, lode or vein in place."

and as having been completed between the 30th day of September, 1949 and the 7th day of October, 1949. The Certificate was recorded on October 14, 1949.

It will be noted that discovery work on Kay Coopers Nos. 6 and 8 is described as consisting of an Open Cut, and on the Kay Coopers Nos. 9 and 10 as consisting of a pit. The characteristics and dimensions of these workings were mentioned in the testimony of the two locators, and will be discussed later.

The Certificates of Location were all duly recorded as required by sec. 4122 N.C.L. 1941 Supp., and plaintiff then proceeded to supplement the documentary record with oral testimony on the several acts of location. We shall confine our attention to the lack of discovery on Kay Cooper Nos. 6, 8, 9 and 10.

Reviewing plaintiff's supporting evidence on discovery in the order in which it appears in the record:

Joe Federhoff testified that as an employee of J. L. Dougan, and acting under the instructions of Lee Dougan, he diamond drilled "the property" to the extent of approximately 700 or 800 feet, from about the middle of February, 1950 until the latter part of March, 1950 but did not designate the locus of his drilling by claim name (Tr. 77-8). The witness also testified that he took out cores, marked and preserved them, and described the machinery used by him in the process of drilling (Tr. 77-8).

The witness was not asked, and did not testify on what particular claim or claims comprised in the Kay Cooper group his drilling was performed, nor did he furnish any information as to the character of the rock penetrated by the drill, or as to the mineral content, if any, shown in the cores. Beyond question, if one seeks to establish a mineral discovery by core drilling, sound mining practice requires production of the cores and assays as evidence of what was found in the drill hole at depth in order to indicate the existence of a vein or lode. That is the initial step toward establishing a valid discovery.

For all practical purposes, and in the absence of drill cores with certified assays of their mineral content, the testimony of this witness is wholly ineffectual.

In any event, it is open to question whether drilling performed between the middle of February and the end of March, 1950 may be considered as supplementing and correcting defects in discovery work which should have been performed within 90-days following location, unless evidenced by filing of the Amended Certificates of Location prescribed by Sec. 4125, N.C.L., 1929.

Plaintiff's witness J. L. Dougan, optionee of the Kay Cooper locators, R. C. Peterson and Carl Cooper, under their Agreement of September 8, 1949 (Plaintiff's Ex. 3, Tr. 73), testified that he first visited the Kay Cooper group one week after the Agreement was executed (Tr. 82), accompanied by Victor E. Peter-

son and his brother Lee Dougan; that he saw the monuments and workings on each of the Kay Cooper claims about September 11, 1949 (Tr. 84); that he saw Mr. Peterson and Mr. Cooper "working out there" (Tr. 85); that he was on the property again the latter part of October, 1949, and about the 1st of December, 1949, and they were working on the Kay Cooper No. 8 and on the Kay Cooper No. 2 "making additional cuts" (Tr. 85-6); that he next visited the property in April, 1950 and that between September 8, 1949 and April 1, 1950 he spent between $19,000.00 and $20,000.00 on the property, of which $10,000.00 was option money paid to Cooper and Peterson and to Boyle Brothers for drilling costs (Tr. 87-8).

Testimony elicited from this witness on direct examination did not identify discovery on any of the Kay Cooper claims, and designated only one of the claims in controversy, Kay Cooper No. 8, as a place where work was being performed when he visited the property in October and December, 1949. It is also significant that the option granted to this witness on September 8, 1949 and thereafter extended on October 8, 1949 and again on December 14, 1949 was relinquished by the witness on June 30, 1950 after expending upwards of $20,000.00 (Tr. 73).

In the absence of any explanation of record regarding this relinquishment, it may be reasonably assumed that in the opinion of the witness the lands embraced in the optioned properties did not warrant the expenditure of further time and money.

On cross examination this witness testified that monuments of the Kay Cooper claims were pointed out to him but he paid no attention (Tr. 89); that he had no knowledge as to who did the work on the Kay Cooper locations before his first visit to the property in September, 1949 (Tr. 90); that at the time of his first visit, Kay Cooper No. 8 had already been located and Kay Coopers Nos. 9 and 10 were in process of location (Tr. 91); that on his first trip to the grounds he saw an old building and small workings on the southwest portion of the claim, and again observed that same camp site on his subsequent visit (Tr. 92-3).

Carl Harry Cooper, one of the locators of Kay Cooper Nos. 6, 8, 9 and 10, testified on direct examination that he has been prospecting for mining claims for 25 years (Tr. 119); but when asked to state exactly what he did in locating one of the Kay Cooper group answered: "I can't tell you exactly what happened. I can state that we went out lamping the ground there, prospecting around for tungsten." (Tr. 120-1). In connection with monumenting the witness stated that side-line posts are not compulsory. (Tr. 122).

Testifying generally in relation to discovery work performed on other claims in the Kay Cooper group the witness stated: "When we found our tungsten, we dug a trench consisting of in excess of 240 feet or more, an open cut" and "that he found tungsten in that cut." (Tr. 123); that they started locating in June 1949, sometime between the 9th and 12th, and finished in 1950 (Tr. 127).

The testimony of this witness is so generalized that the limited evidence he furnished on the question of discovery on Kay Cooper Nos. 6, 8, 9 and 10 cannot be brought into proper focus as to those claims without referring to other claims in the Kay Cooper group which are not now in dispute. The witness testified that he did the location work on Kay Cooper Nos. 6 to 11 "the same as the past, open cut, 240 cubic feet or more each and every one of them." When asked if that was the condition "on each of those claims, from 6 to 11," the witness answered: "That's right." (Tr. 129); and that they found ore, tungsten, scheelite, in the location cuts (Tr. 129).

The witness gave further generalized testimony that he worked for Mr. Dougan while he had his option on the property; that he helped to do work on the Kay Cooper No. 8 and the Kay Cooper No. 2, that he worked there for four or five days during the first part of October, 1949 (Tr. 139-140), and that Peterson, Daly and Seri worked there at the same time (Tr. 140).

The witness Cooper testified that discovery work shown in the Certificates of Location for Kay Coopers Nos. 6, 8, 9 and 10 was taken from measurements made by him and that Peterson and Brown did the discovery work (Tr. 165-166).

L. B. Spencer, testified on direct examination that he is a civil and mining engineer and made a survey of the Kay Cooper group in March, 1951 returned there for further work in April, 1951 and prepared the map (Plaintiff's Ex. 11, Tr. 176); that he was em-

ployed by plaintiff, Harley Gustin, "to make a survey locating the corners of the claims as they occurred on the ground, the location of the discovery monuments and such work as was designated as discovery work on those claims." (Tr. 176).

The witness then testified that after the first survey was made, in March and April, 1951, he surveyed "the workings and drill holes which were pointed out to me by Mr. Albert Brown as the work which had been done on the property;" that he plotted them on the map and listed the descriptions (Plaintiff's Ex. 11, Tr. 176-7); that he also prepared the maps (Plaintiff's Ex. 17, Tr. 177) showing the workings as added from his later survey, the location of the drill holes and listing the different workings by number and position as located by his survey on the ground (Tr. 177).

On cross examination the witness testified that Plaintiff's Ex. 17 is an exact duplicate of Plaintiff's Ex. 11, "with the exception of the added data concerning work and improvements" which he found to be on the claims represented, on the basis of the later survey which was made on April 8th or 10th, 1951 (Tr. 178-9).

The witness admitted that he had no personal individual knowledge as to how or by whom any of the developments indicated in his legend were placed on the ground—they were pointed out to him by Albert Brown and then surveyed where they found them (Tr. 179); and that the circles shown on Plaintiff's Ex. 17 indicate the discovery monuments on each claim (Tr. 180).

Another witness called by plaintiff in his efforts to establish discovery was R. C. Peterson, one of the co-locators of the Kay Cooper group (Tr. 181). On direct examination this witness also testified in general terms and described the discovery work performed by himself and Mr. Brown on Kay Cooper No. 1 as "a hole in the ground," which measured "over 240 cubic feet of ground removed" (Tr. 182), and found mineral in all of them (Tr. 184-5). The witness then described the discovery work on Kay Cooper Nos. 6, 8, 9 and 10 as "open cuts and such as that" (Tr. 185).

On cross examination the witness could not state whether there was mineralized rock in place in each of the discovery holes, and all he could say was that "there was mineral present in each hole" (Tr. 190). When asked whether he found mineral in rock in place, in a vein, in each discovery hole, he answered: "That I couldn't say for sure" (Tr. 190-191).

The witness did not recall doing any work on Kay Cooper No. 8—"That work was started after I left there" (Tr. 188).

On redirect examination the witness further testified that the scheelite found on the Kay Cooper claims was in a decomposed granite (Tr. 194).

Victor E. Peterson, a witness called by plaintiff, testified on direct examination that he is a civil engineer (not a mining engineer) and geologist employed by Equity Oil Company, of which Mr. J. L. Dougan is president (Tr. 195-196).

He first visited the Kay Cooper claims in May, 1949, at the request of the locators, Peterson, Cooper and Brown, spent one day and part of one night on the Kay Cooper No. 2 and next visited the property over the weekends of July 4th and July 24th, 1949 as a consultant, for the purpose of helping the locators to appraise and sell the property (Tr. 197). On those three visits he centered his efforts on sampling and lamping on Kay Cooper No. 2, and upon his return to Salt Lake City "expressed his enthusiasm" to his employer's president, Mr. J. L. Dougan (Tr. 198-201).

The witness returned to the property about September 14, 1949 and he and Lee Dougan prepared a topographic map (Plaintiff's Ex. 18 Iden.) from a survey they made during the period September 11th to 18th, 1949 and November 30th to December 11th, 1949, covering only Kay Cooper No. 8 and Kay Cooper No. 2 claims (Tr. 202-3).

The witness was then shown Plaintiff's Ex. 17 (Spencer map with added workings) and when asked whether two trenches shown on Ex. 18 (Iden.) correspond with the red and black markings on that exhibit answered: "To be absolutely sure, I would have to see them on the map, but I think without question they are." (Tr. 204); that he knew who was doing the work on the trenches—did not watch the work, but saw it from time to time, and saw R. C. Peterson, Daley, Lee Dougan and another miner with Mr. Dougan, and that he helped Mr. Dougan outline the locations for the excavations that were made (Tr. 204-205).

The witness testified that Plaintiff's Ex. 19 (Iden.) is a tracing of the Kay Cooper portion of the colored map (Plaintiff's Ex. 18), on which he has outlined the Kay Cooper claims in green and the Ray Ricketts claims in red (Tr. 209).

When asked if he found mineral in place on these claims, the witness first answered "I did," and when asked on "What claims?" answered: "On all claims," but then stated:

> "Now if I may, in order to clarify my position on that, I would like to make a definition of what I saw." (Tr. 211).

The witness then proceeded to clarify, and also to materially qualify his precedent affirmance that he found "mineral in place on these claims." Summarizing what he found, the witness did not designate by name any of the claims in dispute other than Kay Cooper No. 6 and Kay Cooper No. 8. After describing the mineralization as occurring in granitic rock and deposits of unconsolidated material, the witness adverted to the question of ore in place and stated:

> "Now from a geologist's standpoint, without going into considerable work, I can not say whether or not that unconsolidated material, which a layman might refer to as gravel, is the result of residual weathering or transported there. For that reason I can not say, in some instances, whether or not the ore is in place. Now that is true in the case of the ore in the vicinity of the Kay Cooper No. 8, where I can not say definitely whether it is transported material or is the result of residual weathering, whereby it is

possible to develop material of granular nature strictly through weathering, through no transportation, so as to say whether or not we found ore in place in some instances, I do not know for sure without further investigation. However, there was scheelite, tungsten, at the site, at these sites. In the discovery cuts we found tungsten in place in that respect."

Interrupting the Court's unfinished question: "That would apply to all of the—" the witness answered:

"That would not apply to all of them. Of course, in the case of No. 8, there is definite showing on the rock, on the surface. In the case of No. 2 that is also true. On No. 4 it is pretty definitely in place. On No. 6 it is very definitely in place. In the claim which lies to the south, in what might be called reconsolidated matter, that is open to question."

(Tr. 211-213).

Plaintiff's closing evidence in chief was in the form of a deposition of Albert Brown.

This witness testified that he has been engaged in the business of prospecting and mining for about 45 years and assisted in locating the Kay Cooper group commencing on June 12, 1949 (Tr. 219).

The witness then gave more generalized testimony regarding Kay Cooper locations no longer in dispute; that they had lamped the ground and discovered ore in place on Kay Cooper Nos. 1 and 2 (Tr. 220-226); used the same process for Kay Cooper No. 3 and No. 4

(Tr. 231-237); and could not recall whether he assisted in locating the Kay Cooper No. 5 (Tr. 237).

On cross examination the witness further testified only in regard to the Kay Cooper Nos. 1 to 5; stated that there was a discovery of mineral-bearing rock in place on each of those claims, but neither on direct examination or cross examination gave any testimony whatever regarding Kay Coopers Nos. 6, 8, 9 and 10.

The testimony of plaintiff's witnesses descriptive of the discovery work performed on Kay Cooper Nos. 6, 8, 9 and 10 lode locations does not support the descriptions of such work in the Certificates of Location filed by the locators, either as to the discovery of a vein or lode required by Federal law, or as to the exposure of a lode deposit of mineral in place prescribed by Nevada law. The meagre evidence presented is inadequate to meet the requirements of either the Federal or State statute.

The nearest approach to any positive evidence of discovery was made by the witness Victor E. Peterson, civil engineer and oil geologist, in his qualifying statement on the question of mineralized ore in place, but neither in his explanatory dissertation or elsewhere in his testimony did this witness once mention the presence of a "vein or lode," as required under Federal law, or of "a lode deposit of mineral in place," as required by Nevada law.

Standing alone and unchallenged this type of evidence on what constitutes discovery does not suffice to meet those requirements.

Had there been no traverse of plaintiff's evidence, the fact remains that plaintiff failed to produce sufficient proof of prior discovery to make a *prima facie* showing on his case in chief and thereafter made no substantial effort to rectify that defective showing in rebuttal.

Such generalities as are connoted by references to a surface mineral showing in the wide area embraced in a contiguous group of locations, but not identified with any specified location or sufficiently described to show a vein or lode of mineralized rock in place, do not meet the Federal and State requirements for an actual discovery within the area embraced by each asserted mineral location.

We now propose to show that such evidence as is presented by plaintiff in relation to discovery is countered by a succession of defendants' witnesses who gave positive testimony on the absence of a vein or lode of mineralized rock in place on any of plaintiff's disputed locations, as of February 8, 1951.

Harold Morris Weaver, called out of order as defendants' first witness, testified that he is a graduate mining engineer and geologist, was employed by defendant Nevada-Pacific Development Corporation to examine the Kay Cooper and Ray Ricketts groups of mining locations in August, 1953 (Tr. 99-100); that he prepared certain contour and profile maps (Defendants' Ex. B, and D) and a profile model (Defendants' Ex. C, Tr. 102-104); that he had no personal knowledge of who performed the work or erected

corner posts indicated on the profile map by colored pins (Tr. 105); that he used the Spencer map (Plaintiff's Ex. 11) as a source of information for plaintiff's discovery monuments of the Kay Cooper claims on the contour map; used the Malone Engineers' map (Defendants' Ex. A) for identifying the Ray Ricketts' location or discovery monuments on the profile map (Tr. 107-8); and that the composite map showing the Ray Ricketts locations superimposed on the Kay Cooper locations (Defendants' Ex. B) was used by him in preparing the profile model (Tr. 108).

On cross examination the witness described in detail how he prepared the profile map and relief model (Defendants' Ex. C, Tr. 108-117); that the relief model shows "general terrain, the location of the claims upon the terrain and the location of the excavations of that terrain" (Tr. 116).

In admitting the relief model in evidence (Defendants' Ex. C), and referring to the descriptive testimony, the Court said:

> "What he said is it is a very accurate representation of the topography, that it shows the places where the excavations were made, it shows those that were designated to him as having been made by his client, it shows those which were not so designated, which perhaps assumed that they were made by other people. I think that is all. Is that right?"

to which the witness replied affirmatively (Tr. 117).

Charles W. Hulbert, (known also as "D" Hulbert and "Drummond" Hulbert), one of the defendants and a co-locator of Ray Ricketts Nos. 1, 2 and 4 lode

claims, testified that he is in the cattle and mining business, first visited the area of the ground now in dispute about 1933 with his father-in-law, Ray Ricketts, who was mining in the immediate area now occupied by the Ray Ricketts claims, which were then known as the "Granites" (Tr. 276-9).

After narrating further historical data affecting the disputed area, and indicative of his familiarity with the terrain during the period from 1933 to the year 1950, when he spent at least six months on the ground (Tr. 280-308), the witness answered that he, Gregory and Rueter (Rutter) examined the discovery work on the Kay Cooper claims (Tr. 310-311);

That they started on Kay Cooper No. 8, which is close to defendants' camp, and "That work that was done on No. 8, it was nothing but sand, like my No. 3 down there." (Tr. 311; 320-1);

> "And No. 9 was in sand . . . and No. 10 is another one in sand."

The witness was then asked to state whether there was a lode in place in the discovery workings on any of the Kay Cooper Nos. 8, 9 and 10 claims, and answered:

> "No, absolutely no." (Tr. 311).

The witness then testified that the Ray Ricketts Nos. 1, 2 and 4 were located by himself and Larry Prisk on February 8, 1951 (Tr. 313-316), described the monumenting and marking of boundaries on each claim (Tr. 316-318), and described in detail the discovery work performed by himself, Rueter and Dayton with the use of a compressor and jack hammer on

each claim and the exposure of a lode in place on each of those claims (Tr. 318-321).

The witness admitted failure of discovery on Ray Ricketts No. 3, that they never struck a lode, "Only the sand." (Tr. 320-1).

There were admitted in evidence Certificates of Location for Ray Ricketts Nos. 1, 2 and 4 (Defendants' Ex. G, Tr. 269-273) filed by the locators pursuant to sec. 4121 N.C.L. 1929;

The Certificate of Location for Ray Ricketts No. 1, recorded April 6, 1951 describes the discovery work as:

> "The discovery work consists of an open cut located about 10 feet in a Northerly direction from the location monument and its dimensions are 6 feet wide, 50 feet long and 4 feet deep, exposing ledge, lode or vein in place."

and as having been completed since February 21, 1951.

The Certificate of Location for Ray Ricketts No. 2, recorded April 6, 1951, describes the discovery work as:

> "The discovery work consists of an open cut located about 75 feet in an easterly direction from the location monument and its dimensions are 4 feet wide, 25 feet long and 4 feet deep, exposing ledge, lode or vein in place."

and as having been completed since March 29, 1951.

The Certificate of Location for Ray Ricketts No. 4, recorded April 6, 1951 describes the discovery work as:

> "The discovery work consists of an open cut located about 75 feet in a southerly direction from the location monument, and its dimensions are 25 feet wide, 75 feet long and 2 feet deep, exposing ledge, lode or vein in place."

and as having been completed since March 29, 1951.

G. F. Sturdevant, superintendent of operations for defendant Nevada-Pacific Development Corporation, testified at length on the discovery work performed under his supervision between March 3rd and 30th, 1951 (Tr. 360-368), which he described seriatim as:

Ray Ricketts No. 1: Installed a compressor, strung an airline (Tr. 364). Put two men to work with jackhammer—excavated cut approximately 50 feet by 4 feet wide by 3 feet deep, exposing vein in place at bottom of cut, an exposure of scheelite (Tr. 366).

Ray Ricketts No. 2: Began work on March 3, 1951 (Tr. 360, 363-4). Installed compressor and air line. Followed scheelite exposure for 25 feet. Scheelite in bottom of hole and in bottom of whole trench. Dimensions of trench—twenty-five feet long, six feet wide and four feet deep (Tr. 363-4).

Ray Ricketts No. 4: Prisk, as an employee of Nevada-Pacific Development Corporation and under Sturdevant's direction, worked with a large tractor and blade rented from Wells Cargo Corporation. Ran an open cut approximately fifty feet long, twelve feet wide and three feet deep, exposing a lode or vein in place (Tr. 367).

This witness also testified that when the work had been completed on Ray Ricketts Nos. 1, 2 and 4, he moved the tractor to Ray Ricketts No. 3 claim "to see if we could find bedrock by the use of the tractor. There was a great deal of digging but it was all sand;" and that he "excavated a cut thirty feet long which exceeded eight feet in depth at the deepest part." (Tr. 368).

Charles E. Walton, employed as field man for Nevada-Pacific Development Corporation, testified that he first visited the property on March 19, 1951 (Tr. 370);

That shortly after he went on the ground he had occasion to do some work in the neighborhood of Kay Cooper Nos. 8, 9, 10 and 11, near the location work on those claims (Tr. 382);

That he checked the discovery work on Kay Cooper No. 8 and observed that it was in sand; and that he did not see a lode or vein in place in the discovery work on Kay Cooper No. 8 (Tr. 382);

That he had on frequent occasions from 1951 up to the time of trial observed the discovery work on Kay Cooper No. 8, over a radius of 150 feet from the location work and saw no evidence of other work at that time; that the only evidence in 1952 of any change was more falling-in from the sides and from the back of this particular cut; that he covered that area several times and there was no change (Tr. 383);

That he first saw the discovery work on Kay Cooper No. 9 in March, 1951, that there was not much evi-

dence of caving in the hole—just a little falling at the sides; that he had observed the location work frequently since that time; that in August, 1952, when the pictures were taken, there was a little more caving in the hole; that when he first saw the discovery work in March, 1951, there was no lode or vein in place at the bottom of the workings, only sand (Tr. 384-5); and

That he made an examination of the discovery work on Kay Cooper No. 10 early in 1951, about the same time he examined Kay Cooper No. 8 and Kay Cooper No. 9; that he did not observe any lode or vein in place, and that there was considerably more caving in the hole when the picture was taken in August, 1952 (Tr. 385-6).

This witness also testified that he again examined the Kay Cooper Nos. 8, 9 and 10 on November 11, 1953, cleaned out the holes to some extent and removed enough dirt to permit sinking drill holes to a depth of approximately five feet in the location work (Tr. 388-9); and that he used one ¾″ steel drill approximately 5 feet long and one ⅞″ steel drill approximately 5½ feet long (Tr. 389-390, 392).

The witness was then asked:

> "Will you state whether or not it was necessary to hard rock these steels in; was it free?"

to which he responded:

> "No, though at times they would go in fairly easy and we would have a tighter spot for an inch or two and go on through that. They were more

> or less free, but we did use pipe wrenches to pull them out in some instances."

and then stated that the drills were driven the full length in each instance (Tr. 390).

Lee V. Dougan, as the only witness called by plaintiff in rebuttal, testified that he first visited "the property" in 1949 (Decoration Day), for one day and half a night; next about July 24, 1949 for a little over a week, again in August, 1949, and was on the property for J. L. Dougan when he had his option during the period from September 8, 1949 until June, 1950 (Tr. 395);

Supervised the work that was being done in trenches dug on Kay Cooper Nos. 8 and 2, and found ore in place (Tr. 397).

Visited the workings of Nevada-Pacific Development Corporation in 1953, which were on the same ground as Kay Cooper Nos. 8 and 2, and found veins in both of the workings of Nevada-Pacific Development Corporation, which were a continuation of the same veins he saw on Kay Cooper Nos. 8 and 2. "In fact, our B trench is right over their workings. That is just a short trench. We had just a little showing there and as they went down they opened up their ore and it is the same trench that goes in the south face of the A trench" on No. 8 (Tr. 398-9).

Called as defendants' witness Mr. Dougan then testified that he did not know when he first observed "that discovery work" (Tr. 400).

When asked the nature of the discovery work the witness answered "It is a pit—all I can say is that it was figured out better than 240 feet. That is, I didn't do the work I just told them I wanted that much work done and measured it by an engineer of mine afterwards;" and upon being asked if he is personally familiar with the location work (discovery work) on Kay Cooper No. 6, Kay Cooper No. 8, Kay Cooper No. 9 and Kay Cooper No. 10, the witness answered in the negative successively as to each and every claim (Tr. 401).

The concluding statement made by plaintiff's engineer, Lee V. Dougan, descriptive of the discovery work done pursuant to his orders on all of the Kay Cooper locations, between May, 1949 and June, 1950 demonstrates the inadequacy of such work for recognition as establishing legal discoveries on any of plaintiff's attempted locations.

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2. PLAINTIFF HAS THE BURDEN OF PROVING A PRIOR LODE DISCOVERY ON EACH CLAIMED LOCATION.

The burden is upon plaintiff to establish that a vein or lode was discovered within the boundaries of the Kay Cooper Nos. 6, 8, 9 and 10, as required by R.S. sec. 2320 and that such vein or lode disclosed a deposit of mineral in place as required by sec. 4121, N.C.L. 1929, before the areas sought to be embraced in those purported locations were peaceably entered and relocated by defendants' grantors on February 8, 1951.

In consonance with the restrictive provision of Federal law, discovery of a vein or lode within the limits of the claim located is a fundamental requisite to the validation of a mineral location.

"In an action for the possession of a mining claim where the defendant is in actual possession the burden is upon the plaintiff to show that the prior location was made and perfected in compliance not only with this chapter, but also with any provisions of the statutes of the state not inconsistent with the United States statutes."

Van Zandt v. Argentine M. Co., C.C.Colo. 1881, 8 F. 725, affirmed *Argentine M. Co. v. Terrible M. Co.,* 1887, 7 S.Ct. 1356, 122 U.S. 478, 30 L.ed. 1140.

And to same effect:

Cooper Globe M. Co. v. Allman, 1901, 64 P. 1019, 23 Utah 410, 417;

Bryan v. McCaig, 1887, 15 P. 413, 10 Colo. 309;

Sweet v. Webber, 1884, 4 P. 752, 7 Colo. 443, 450;

McCowan v. Maclay, 1895, 4 P. 602, 16 Mont. 234;

Hopkins v. Noyes, 1883, 2 P. 280, 4 Mont. 550.

"The burden of proving a prior discovery is on the party asserting it."

Sands v. Cruikshank, 87 N.W. 589;

Dean v. Omaha-Wyoming Oil Co., 128 P. 881;

Jones v. Prospect Mountain Tunnel Co., 21 Nev. 339.

The question of what constitutes a vein or lode has been well defined by the Courts, federal and state.

"Rock or matter of any kind, in order to constitute a vein or lode within the meaning of this section, must be metalliferous and contain such mineral value as will distinguish it from the country rock, especially where no well-defined walls appear."

Grand Central M. Co. v. Mammoth Min. Co., 1905, 29 Utah 490, 83 P. 648, error dismissed; *Mammoth M. Co. v. Grand Central M. Co.*, 1909, 29 S.Ct. 413, 213 U.S. 72, 53 L.Ed. 702.

"In the absence of defined walls and of mineralization appreciably greater than that contained in the general mass of the mountain, broken, strained, and fissured material, or crushed and brecciated matter, characteristic of the district cannot be held to constitute a vein or lode, under this section, and in such case the limits of fracturing do not constitute the limits of the vein, and even if there be found an occasional bugg or fragment of ore, yet, where it is disconnected from any ore body, and so intermingled with the surrounding country rock that it cannot be regarded as continuous, it does not mark the line of the vein or lode, within the meaning of the law."

Grand Central M. Co. v. Mammoth Min. Co., supra.

"A vein cannot be said to exist merely because rock is crushed, shattered, or even fissured, and what constitutes a vein must depend somewhat

upon the nature of the country in which it is alleged to be found."

Grand Central M. Co. v. Mammoth Min. Co., supra.

"A lode is a zone, belt or body of quartz or other rock lodged in the earth's crust, and presenting two essential and inherent characteristics, viz: (1) It must be held 'in place' within or by the adjoining country rock; and (2) it must be impregnated with some of the minerals or valuable deposits mentioned in the statute."

Meydenbauer v. Stevens, D.C. Alaska, 1897, 78 F. 787, 789, 791.

See also:

Consolidated Wyoming Gold M. Co. v. Champion M. Co., C.C.Cal. 1894, 63 F. 540, 544;

Jupiter M. Co. v. Bodie Consol., etc. M. Co., C.C.Cal., 1881, 11 F. 666, 675;

North Noonday M. Co. v. Orient M. Co., C.C. Cal., 1880, 1 F. 522, 530;

Fitzgerald v. Clark, 1895, 42 P. 273, 17 Mont. 100, 136, 30 L.R.A. 803, 52 Am. St. Rep. 664;

Schreve v. Copper Bell Min. Co., 1891, 28 P. 315, 11 Mont. 309, 355.

"Not every crevice in the rocks, nor every outcropping on the surface which suggests the possibility of mineral, or which may, on subsequent exploration, be found to develop ore of great

value, can be adjudged a known vein or lode within the meaning of this section."

Iron Silver M. Co. v. Mike & Starr, etc., M. Co., Colo. 1892, 12 S.Ct. 543, 143 U.S. 394, 401, 36 L.ed. 201;

Erhardt v. Boaro, Colo. 1885, 5 S.Ct. 560, 113 U.S. 527, 28 L.Ed. 1113.

"Mere indications of mineral, however strong, are not sufficient to answer the requirements of this section on the subject of discovery, either as to lode or placer claims."

Iron Silver M. Co. v. Mike & Starr, etc., M. Co., supra;

See also:

Chrisman v. Miller, Cal. 1905, 25 S.Ct. 468, 197 U.S. 313, 323, 49 L.Ed. 770, affirming *Miller v. Chrisman,* 73 P. 1083, 74 P. 440, 140 Cal. 440, 98 Am.St.Rep. 63.

"Rock, whether brecciated or bedded, is not within this section, even when it is found between well-defined walls, unless it has been mineralized."

Utah Consol. M. Co. v. Utah Apex Min. Co., C.C.A. Utah 1922, 285 F. 249, certiorari denied, 1923, 43 S.Ct. 362, 261 U.S. 617, 67 L.ed. 829.

It is also well established by high judicial precedent that no priority of location or right of exclusive possession inure to a location sans discovery.

"Priority of discovery gives priority of right against naked location."

Cook v. Klonos, Alaska 1908, 164 F. 529, 537, 90 C.C.A. 403, modified on other grounds C.C.A. 1909, 168 F. 700.

See also:

Belk v. Meagher, Mont. 1881, 104 U.S. 279, 26 L.Ed. 735;

Cook v. Klonos, Alaska, 1908, 164 F. 529, 536, 90 C.C.A. 403, modified on other grounds, C.C.A. 1909, 168 F. 700, 94 C.C.A. 144;

Johanson v. White, Alaska 1908, 160 F. 901, 88 C.C.A. 83;

Bevis v. Markland, C.C.Wash. 1904, 130 F. 226;

Crossman v. Pendery, C.C.Colo. 1881, 8 F. 693;

Gemmell v. Swain, 1903, 72 P. 662, 28 Mont. 331, 98 AM.St.Rep. 570;

Garthe v. Hart, 1887, 15 P. 93, 73 Cal. 541;

Horswell v. Ruiz, 1885, 7 P. 197, 67 Cal. 111.

"Where an alleged locator has not made a discovery and has not retained possession for the purposes of prosecuting work looking to a discovery, his mere posting of notice and marking of boundaries upon the ground will not serve to exclude others who may peaceably enter upon the land while he is not actually working or occupying it."

New England & Coalingo Oil Co. v. Congdon, 1907, 92 P. 180, 152 Cal. 211, 213.

"A competent locator has the right to initiate a valid claim to unappropriated public land by a

peaceable adverse entry thereon while it is in the possession of those who have no superior right to acquire the title or hold the possession."

Thallman v. Thomas, Colo. 1901, 111 F. 277, 279, 49 C.C.A. 317.

See also:

Belk v. Meagher, supra;

Duffield v. San Francisco Chemical Co., Idaho, 1913, 205 F. 480, 123 C.C.A. 548; *San Francisco Chemical Co. v. Duffield,* Wyo., 1912, 201 F. 830, 834, 120 C.C.A. 160, certiorari denied 1913, 33 S.Ct. 464, 229 U.S. 609, 57 L.Ed. 1350;

Nevada Sierra Oil Co. v. Home Oil Co., C.C. Cal., 1889, 98 F. 673.

"Where there is no valid existing location upon mineral lands of the United States, any competent locator may enter even if it is in the actual possession of another, provided he can do so peaceably and in good faith, in order to initiate a location for himself; but no such right upon any such land, whether mineral or agricultural, which is in the actual possession of another, can be initiated by a forcible, fraudulent, surreptitious, or clandestine entry thereon."

Atherton v. Fowler, Cal. 1878, 96 U.S. 513, 24 L.Ed. 732.

In performing the location work necessary to a valid discovery of a lode mining claim in Nevada, resort may be had to alternative methods of exploration:

(a) The locator must sink a discovery shaft four feet by six feet to the depth of at least ten feet "from the lowest part of the rim of such shaft at the surface or deeper, if necessary to show by such work a lode deposit of mineral in place"; or

(b) A cut or crosscut or tunnel which cuts a lode at a depth of ten feet; or

(c) An open cut along the said ledge or lode, equivalent in size to a shaft four feet by six feet by ten feet deep.

The two alternatives are accepted as equivalent to the sinking of a discovery shaft, conditioned upon discovery of the lode deposit of mineral in place.

Under the first alternative it is definitely stated that the prescribed "cut" or "crosscut" or "tunnel" must also cut the lode at a depth of ten feet.

Where resort is had to the second alternative, it is equally clear that "an open cut along the said ledge or lode, equivalent in size to a shaft four feet by six feet by ten feet deep" necessarily implies that such work must be performed upon a ledge or lode of mineral in place outcropping at the surface. In the absence of such outcrop or exposure of the ledge or lode at the surface the open cut could not be excavated "along said ledge or lode," but would have to be excavated at depth in order to find it.

Any other construction of the "open cut" alternative would nullify Nevada's mandatory requirements for actual discovery, by extending recognition to any

type of sand hole, pit, trench or similar excavation in gravel, detritus or alluvium without regard to the existence of a lode deposit of mineral in place.

In a praiseworthy effort to exercise constructively the legislative power delegated by Congress for the exploration and development of mineral resources on the public domain, Nevada has enacted mining laws clarifying and defining the fundamental requirement that discovery is essential to the valid location of a mining claim. Enforced compliance by the Courts with those reasonable enactments both in Nevada and other States having similar regulatory laws, has demonstrated their efficacy in surmounting the "dog-in-the-manger" policy which formerly permitted segregation and withholding from the public domain of large areas of potential mineral lands by the simple expedients of alleged discoveries and minimum expenditures in so-called annual labor.

> "An expectation is something more than a hope. A location made in the 'hope of finding some ore in it at some time' is worthless, unless the hope should be realized before some one else makes a discovery. While the courts permit a liberal construction, the liberality must be exercised within reasonable and common-sense limits. Locations are not permitted upon a conjectural or imaginary existence of a vein."
>
> 2 Lindley, 3rd Ed., pp. 770-1, citing:
>
> *King v. Amy & Silversmith M. Co.,*
>
> 152 U.S. 222, 227, 14 Sup.Ct.Rep. 510, 38 L. Ed. 419, 18 Morr.Min.Rep. 76.

"To constitute a discovery the law requires something more than conjecture, hope or even indication."

Id., citing:

Miller v. Chrisman, supra;

Erhardt v. Boaro, supra.

"Discovery of detached pieces of quartz, mere bunches, or 'float' is not sufficient."

Id., p. 772, citing:

Jupiter M. Co. v. Bodie Cons. Min. Co., supra;

Book v. Justice M. Co., 58 F. 106, 120, 17 Morr. Min.Rep. 617.

On the major issue of whether discovery was made on plaintiff's locations, Kay Cooper Nos. 6, 8, 9 and 10, it is quite significant that after holding all of those locations under option from September 8, 1949 to June 30, 1950 (Plaintiff's Ex. 3-6), plaintiff's witness and predecessor in interest, J. L. Dougan, surrendered his option because of his disappointment with the property. That explanation of his relinquishment was not furnished by Mr. Dougan personally, but by plaintiff's witness Carl Harry Cooper, who testified that on June 29, 1950:

"Mr. Dougan informed me that the property was being turned back. It didn't stand up to his expectations of ore being there and he turned the property back." (Tr. 132.)

That admission of lack of ore by plaintiff's own witness, and the only person, (other than defendants), shown to have made any substantial effort toward

discovery, stands in the record undenied and unexplained.

Dougan's relinquishment on June 30, 1950 was followed by plaintiff Gustin's acquisition of the property on December 4, 1950 (Plf's Ex. 9, Tr. 74). There is no evidence that any further exploratory work was performed by any person on the Kay Cooper locations subsequent to June 30, 1950, or at any time thereafter until defendant Nevada-Pacific Development Corporation's entry on the Ray Ricketts Nos. 1, 2 and 4 claims on February 8, 1951.

In contradistinction to the paucity of factual evidence of separately identified discoveries on each of plaintiff's Kay Cooper Nos. 6, 8, 9 and 10 locations, defendants fully supplemented the information furnished in their Certificates of Location for Ray Ricketts Nos. 1, 2 and 4 claims (Defts' Ex. G) with positive testimony of an actual discovery made on each of those claims (Tr. 318-321; 360-368).

In so doing, defendants' witnesses frankly admitted that there was no valid discovery made on defendants' Ray Ricketts No. 3 location and that recurrent efforts to expose a vein or lode of mineralized rock in place on that location showed "only sand" (Tr. 320-1; 368).

Defendants' proof of separate and distinctly identified discoveries made on their Ray Ricketts Nos. 1, 2 and 4 claims conforms with the Federal requirement for discovery of a "vein or lode" (R.S. 2320), and also with Nevada's requirement for discovery of "a lode deposit of mineral in place." (Sec. 4121,

N.C.L. 1929). No attempt was made by plaintiff to traverse the testimony of defendants' witnesses on the actuality of those discoveries.

Agreeable to standard practice in conflicts affecting title to mining locations, defendants have assumed and discharged the burden of proving their own superior title to all of the lands embraced in their Ray Ricketts Nos. 1, 2 and 4 lode mining claims (*U. S. Comp. St.* sec. 4625; 30 *U.S.C.* sec. 32, p. 303; 3 *Lindley* 3rd Ed., p. 1862; *Tonopah Ralston M. Co. v. Mt. Oddie M. Co.,* 49 Nev. 420, 248 P. 833).

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3. **FINDINGS OF THE COURT BELOW VALIDATING PLAINTIFF'S KAY COOPER NOS. 6, 8, 9 AND 10 MINING LOCATIONS AS SUPERIOR IN PART TO DEFENDANTS' RAY RICKETTS NOS. 1, 2 AND 4 MINING CLAIMS, AND INVALIDATING DEFENDANTS' RAY RICKETTS NO. 2 MINING CLAIM IN TOTO, ARE CLEARLY ERRONEOUS.**

Admittedly, where there is evidence sufficient to support the findings and judgment of the Court below, they will not be set aside unless clearly erroneous, or where it clearly appears that the Court below misconstrued the evidence in its relation to the governing law. In the case at bar, there has been a misconception by the trial Court of the imperative essentials of a valid discovery under both Federal and State mining laws.

In assigning error in the findings of the Court below, we do so with due regard to the restrictive provision of the Rule (52a F.R.C.P.) against setting aside the trial Court's findings "unless clearly erroneous", but also the mandate of the Rule-Making Act

abolishing the distinction between law and equity practice and defining certain functions of Appellate Courts as promoting justice on the facts of particular cases and establishing general uniformity in law (3 *Moore's Fed. Pr.,* sec. 52.01, p. 3118).

The amended section of Rule 52(b) provides that in cases tried to the Court without a jury, the question of sufficiency of the evidence to support the findings may be raised with or without objection to such findings and with or without motion to amend or motion for judgment in the Court below (*U. S. S. Ct. Digest, "Court Rules,"* p. 244 and cases cited).

It is established by an overwhelming preponderance of the evidence that neither plaintiff's grantors or predecessors, or plaintiff himself, made a discovery on Kay Cooper Nos. 6, 8, 9 and 10 locations within the prescribed period of 90 days from the date of their several locations, and had not made such discovery on any of said purported locations at the time defendants' grantors relocated the Ray Ricketts Nos. 1, 2 and 4 lode mining claims on February 8, 1951.

In the absence of actual discovery of a mineral lode or vein in place, within the purview of Federal and State laws, the lands sought to be embraced in those attempted locations were still part of the unappropriated public domain, and open to peaceable entry and subsequent relocation by defendants' grantors.

Hence defendants earnestly contend that the findings and decision of the Court below are unsupported by the evidence, are contrary to the evidence and against law.

The situation presented in the case at bar is demonstrably such as is within contemplation of the exception reserved in Rule 52a.

"Supreme Court must on appeal correct clear error even in findings of fact."

U. S. v. Yellow Cab Co., Ill. 1949, 70 S.Ct. 177, 338 U.S. 338, 94 L.Ed. 150.

"Under this rule a finding of fact is 'clearly erroneous' if it is against the clear weight of the evidence, and it does not suffice that it is supported by evidence."

Fleming v. Palmer, C.C.A. Puerto Rico, 1941, 123 F. 2d 749, certiorari denied 62 S.Ct. 942, 316 U.S. 662, 86 L.Ed. 1739.

"Under subdivision (a) of this rule, a finding is 'clearly erroneous' when although there is evidence to support it reviewing court on entire evidence is left with definite and firm conviction that a mistake has been committed."

U. S. v. U. S. Gypsum Co., 1948, 68 S.Ct. 525, 333 U.S. 364, 92 L.Ed. 92, rehearing denied 68 S.Ct. 788, 333 U.S. 869, 92 L.Ed. 1147.

"When there is a misapprehension of the evidence by the district court and its decision is so clearly erroneous that it is against the truth and right of the case, the Court of Appeals may give effect to its own conclusions."

Special Service Co. v. Delaney, C.A. La., 1949, 172 F. 2d 16.

"A trial Court's fact findings are clearly erroneous, as required by federal civil procedure rule

for appellate court to set them aside, when not supported by substantial evidence, contrary to clear preponderance of evidence, or based on erroneous view of law."

Magidson v. Dubban, C.A. Mo., 1954, 212 F. 2d 748.

"The rule that a reviewing court will not disturb findings of fact made by trial judge unless they are clearly erroneous does not apply if he has committed error of law which has manifestly influenced or controlled his findings of fact, such as mistake as to burden of proof."

Owne v. Commercial Union Fire Ins. Co. of New York, C.A. Md. 1954, 211 F. 2d 488.

It is respectfully submitted that the judgment of the Court below should be reversed, insofar as and to the extent that said judgment operates to vest title in plaintiff to those parts or portions of Kay Cooper Nos. 6, 8, 9 and 10 locations which overlap or are in conflict with defendants' Ray Ricketts Nos. 1, 2 and 4 lode mining claims, and to deny defendants' title to said conflict areas, and to deny defendants' title to all of the lands embraced in said Ray Ricketts No. 2 lode mining claim.

Dated, Reno, Nevada,
February 25, 1955.

WALTER ROWSON,
Of Counsel for Defendants (Appellants).